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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92626; File No. SR-CboeBZX-2021-053]

### **Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Amend Rule 14.11(m) (Tracking Fund Shares) to Provide for the Use of Custom Baskets Consistent with the Exemptive Relief Issued Pursuant to the Investment Company Act of 1940 Applicable to a Series of Tracking Fund Shares**

August 10, 2021

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 3, 2021, Cboe BZX Exchange, Inc. (“Exchange” or “BZX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) proposes to amend Rule 14.11(m) (Tracking Fund Shares) to provide for the use of “Custom Baskets” consistent

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

with the exemptive relief issued pursuant to the Investment Company Act of 1940 (“Investment Company Act”) applicable to a series of Tracking Fund Shares. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website ([http://markets.cboe.com/us/equities/regulation/rule\\_filings/bzx/](http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/)), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 14.11(m) (Tracking Fund Shares)<sup>3</sup> to provide for the use of “Custom Baskets” consistent with the exemptive relief issued pursuant to the Investment Company Act<sup>4</sup> applicable to a series of Tracking Fund Shares.

To effectuate this change, the Exchange proposes the following amendments to Rule 14.11(m). First, the proposed rule change adopts new subparagraph (F) under Rule 14.11(m)(3) (Definitions), which defines “Custom Basket”, for the purposes of Rule 14.11(m), to mean a portfolio of securities that is different from the Tracking Basket and is otherwise consistent with the exemptive relief issued pursuant to the Investment Company Act applicable to a series of Tracking Fund Shares. The proposed rule change makes conforming amendments to the definition of Tracking Fund Shares in Rule 14.11(m)(3)(A) and Reporting Authority in Rule 14.11(m)(3)(C). The proposed rule change amends the definition of “Tracking Fund Share” in Rule 14.11(m)(3)(A) to provide for creations of shares in return for a deposit by the purchaser of, and

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<sup>3</sup> Rule 14.11(m)(3)(A) defines the term “Tracking Fund Share” as a security that: (i) Represents an interest in an investment company registered under the Investment Company Act of 1940 (“Investment Company”) organized as an open-end management investment company, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; (ii) is issued in a specified aggregate minimum number in return for a deposit of a specified Tracking Basket and/or a cash amount with a value equal to the next determined net asset value; (iii) when aggregated in the same specified minimum number, may be redeemed at a holder’s request, which holder will be paid a specified Tracking Basket and/or a cash amount with a value equal to the next determined net asset value; and (iv) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter.

<sup>4</sup> 15 U.S.C. 80a et seq.

redemptions of shares at a holder's request in return for, a Custom Basket rather than a Tracking Basket to the extent permitted by a fund's exemptive relief. In addition, the proposed rule change amends the definition of "Reporting Authority" in respect of a particular series of Tracking Fund Shares in Rule 14.11(m)(3)(C) to provide for Custom Baskets to the extent permitted by a fund's exemptive relief. Currently, "Reporting Authority" in respect of a particular series of Tracking Fund Shares means the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Tracking Fund Shares (if the Exchange is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, the Tracking Basket; the Fund Portfolio; the amount of any cash distribution to holders of Tracking Fund Shares, net asset value, or other information relating to the issuance, redemption or trading of Tracking Fund Shares. Rule 14.11(m)(3)(C) further provides that a series of Tracking Fund Shares may have more than one Reporting Authority, each having different functions. The proposed rule change adds "Custom Basket" to the non-exclusive list of information relating to Tracking Fund Shares that a Reporting Authority calculates and reports, i.e., including, but not limited to, the Tracking Basket; the Fund Portfolio; the amount of any cash distribution to holders of Tracking Fund Shares, net asset value, or other information relating to the issuance, redemption or trading of Tracking Fund Shares.

Second, the proposed rule change amends Rule 14.11(m)(4) (Initial and Continued Listing), which currently provides criteria that Tracking Fund Shares must satisfy for initial and continued listing on the Exchange, to incorporate specific initial and

continued listing criteria for Custom Baskets. Specifically, Rule 14.11(m)(4)(A)(ii) currently provides that the Exchange will obtain a representation from the issuer of each series of Tracking Fund Shares that the net asset value per share for the series will be calculated daily and that each of the following will be made available to all market participants at the same time when disclosed: the net asset value, the Tracking Basket, and the Fund Portfolio. The proposed rule change adopts an additional requirement in Rule 14.11(m)(4)(A)(ii) providing that the Exchange will also obtain a representation from the issuer of each series of Tracking Fund Shares that the issuer and any person acting on behalf of the series of Tracking Fund Shares will comply with Regulation Fair Disclosure under the Securities Exchange Act of 1934 (“Exchange Act”)<sup>5</sup>, including with respect to any Custom Basket.<sup>6</sup>

Third, the proposed Rule change adopts new Rule 14.11(m)(4)(B)(ii), which provides that, with respect to each Custom Basket utilized by a series of Tracking Fund Shares, each business day, before the opening of trading in Regular Trading Hours (as defined in Rule 1.5(w)), the investment company shall make publicly available on its website the composition of any Custom Basket transacted on the previous business day,

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<sup>5</sup> 17 CFR 243.100-243.103. Regulation Fair Disclosure provides that whenever an issuer, or any person acting on its behalf, discloses material nonpublic information regarding that issuer or its securities to certain individuals or entities—generally, securities market professionals, such as stock analysts, or holders of the issuer’s securities who may well trade on the basis of the information—the issuer must make public disclosure of that information.

<sup>6</sup> The proposed rule change also delineates each of the three representation requirements, as proposed, as (a) through (c) within the text of Rule 14.11(m)(4)(A)(ii) for ease of reading.

except a Custom Basket that differs from the applicable Tracking Basket only with respect to cash.<sup>7</sup>

Finally, the proposed rule change makes conforming amendments to Rule 14.11(m)(2)(E) and (F). In particular, Rule 14.11(m)(2)(E) currently provides that, if the investment adviser to the Investment Company issuing Tracking Fund Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a “fire wall” between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition of and/or changes to the Fund Portfolio and/or the Tracking Basket. Any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company’s Fund Portfolio and/or the Tracking Basket or has access to nonpublic information regarding the Fund Portfolio and/or the Tracking Basket or changes thereto must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund Portfolio and/or the Tracking Basket or changes thereto. The proposed rule change amends 14.11(m)(2)(E) to provide for Custom Baskets to the extent permitted by a fund’s exemptive relief. As proposed, Rule 14.11(m)(2)(E) provides that if the investment adviser to the Investment Company issuing Tracking Fund Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a “fire wall” between the investment adviser and personnel of the

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<sup>7</sup> As a result of the addition of subparagraph (4)(B)(ii), the proposed rule change also updates the subsequent numbering of current subparagraphs (4)(b)(ii), (4)(b)(iii), (4)(b)(iv), (4)(b)(v) and (4)(b)(vi) to (4)(b)(iii), (4)(b)(iv) (4)(b)(v), (4)(b)(vi) and (4)(b)(vii) respectively.

broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition of and/or changes to the Fund Portfolio, the Tracking Basket, and/or the Custom Basket, as applicable. In addition, proposed Rule 14.11(m)(2)(E) provides that any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company's Fund Portfolio, the Tracking Basket, and/or the Custom Basket or has access to nonpublic information regarding the Fund Portfolio, the Tracking Basket, and/or the Custom Basket, as applicable, or changes thereto must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund Portfolio, the Tracking Basket, and/or the Custom Basket, as applicable, or changes thereto.

Rule 14.11(m)(2)(F) currently provides that any person or entity, including a custodian, Reporting Authority, distributor, or administrator, who has access to nonpublic information regarding the Fund Portfolio or the Tracking Basket or changes thereto, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Fund Portfolio or the Tracking Basket or changes thereto. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a "fire wall" between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Fund Portfolio or Tracking Basket. The proposed rule change similarly amends Rule 14.11(m)(2)(F) to provide for Custom Baskets to the extent permitted by a fund's exemptive relief. As proposed, Rule 14.11(m)(2)(F) provides that any person or entity, including a custodian, Reporting Authority, distributor, or administrator, who has access to nonpublic information

regarding the Fund Portfolio, the Tracking Basket, or the Custom Basket, as applicable, or changes thereto, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Fund Portfolio, the Tracking Basket, or the Custom Basket, as applicable, or changes thereto. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a “fire wall” between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Fund Portfolio, Tracking Basket, or Custom Basket, as applicable.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Exchange Act.<sup>8</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>9</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the

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<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).



Section 6(b)(5)<sup>10</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that proposed rule change to provide for the use of Custom Baskets consistent with the applicable exemptive relief applicable to a series of Tracking Fund Shares will perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will permit use of Custom Baskets, consistent with the applicable exemptive relief, in a manner that will benefit investors by increasing efficiencies in the creation and redemption process. More specifically, Custom Baskets provide an issuer with flexibility in portfolio construction that may assist in reducing taxable capital gains distributions for investors and may generally improve tax efficiencies. Further, the use of Custom Baskets, to the extent permitted by a fund's exemptive relief, may also result in narrower bid/ask spreads and smaller premiums and discounts to the net asset value for Tracking Fund Shares to the extent that the Investment Company utilizes Custom Baskets with fewer securities which may, in turn, allow Authorized Participants to more efficiently hedge and participate generally in the Tracking Fund Shares. In addition to this, the flexibility provided in the creation of Custom Baskets may serve to increase competition between issuers. The Exchange believes the proposed rule change will enhance competition among market participants overall, to the benefit of investors and the marketplace.

The Exchange also believes that amending Rule 14.11(m) to incorporate specific initial listing criteria required to be met by Tracking Fund Shares that utilize Custom Baskets is designed to prevent fraudulent and manipulative acts and practices. The

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<sup>10</sup> Id.

Exchange believes that the daily dissemination of the composition of any Custom Basket transacted on the previous day, except a Custom Basket that differs from the applicable Tracking Basket only with respect to cash, together with the right of Authorized Participants to create and redeem each day at the net asset value, will enable market participants to value and trade shares in a manner that will not lead to significant deviations between the bid/ask price and net asset value of shares of a series of Tracking Fund Shares. Further, including Custom Baskets in the requirements of Rules 14.11(m)(2)(E) and (F) would act as a safeguard against any misuse and improper dissemination of nonpublic information related to a fund's Custom Basket or changes thereto. The requirement that any person or entity implement procedures reasonably designed to prevent the use and dissemination of material non-public information regarding a Custom Basket will act to prevent any individual or entity from sharing such information externally and the internal "fire wall" requirements applicable where an entity is a registered broker-dealer or affiliated with a broker-dealer will act to make sure that no entity will be able to misuse the data for their own purposes. As such, the Exchange believes that the proposed rule change to Rule 14.11(m) is designed to prevent fraudulent and manipulative acts and practices.

The Exchange also believes that the proposed initial and continued listing standards are designed to promote disclosure and transparency with respect to the use of Custom Baskets consistent with the applicable exemptive relief. Specifically, the Exchange believes that requiring as an initial listing condition that an issuer and any person acting on behalf of the series of Tracking Fund Shares comply with Regulation Fair Disclosure under the Exchange Act, including with respect to any Custom Basket,

would further the full and fair disclosure objectives of Regulation Fair Disclosure to the benefit of the investing public and all market participants. Further, with respect to each Custom Basket utilized by a series of Tracking Fund Shares, the Exchange believes that requiring, as a continued listing condition, that each business day, before the opening of trading in Regular Trading Hours (as defined in Rule 1.5(w)), an investment company make publicly available on its website the composition of any Custom Basket transacted on the previous business day, except a Custom Basket that differs from the applicable Tracking Basket only with respect to cash, also furthers the goals of transparency and full and fair disclosure, to the benefit of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Exchange believes the proposed rule change, by permitting the use of Custom Baskets, consistent with a fund's exemptive relief, would introduce additional competition among various ETF products to the benefit of investors.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBZX-2021-053 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeBZX-2021-053. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld

from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2021-053 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>11</sup> 17 CFR 200.30-3(a)(12).